IN THE

Supreme Court of the United States

October Term, A. D. 1946.

Nos. 185-186

ANCHOR SERUM COMPANY, a corporation of Missouri,
Petitioner,

vs.

AMERICAN COOPERATIVE SERUM ASSOCIATION,
a corporation of Iowa,
Respondent.

ILLINOIS FARM BUREAU SERUM ASSOCIATION,
a corporation of Illinois,
Petitioner,

vs.

AMERICAN COOPERATIVE SERUM ASSOCIATION,
a corporation of Iowa,
Respondent.

BRIEF OF AMERICAN COOPERATIVE SERUM ASSOCIATION IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

INDEX.

CITATIONS.

Cases.

Statutes.

Texts.

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OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 1247-1269) is reported in 153 F. (2d) 907-918.

JURISDICTION.

The judgment of the Seventh Circuit Court of Appeals was entered March 4, 1946 (R. 1247). Petition for rehearing was denied April 3, 1946 (R. 134). Petition for writs of certiorari was filed June 13, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether the Circuit Court of Appeals erred in affirming a judgment in favor of the respondent and against the petitioners in the amount of $13,347.93 for damages sustained because of petitioners' violations of the Anti-Trust Laws.

STATUTE INVOLVED.

The pertinent provisions of the Anti-Trust Laws (15 U. S. C. A. §§ 13, 15), which were relied upon to sustain plaintiff's cause of action, are as follows:

> "§ 13. **Discrimination in price, services, or facilities—Price; selection of customers.**
>
> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of

either of them: *Provided,* That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided, further,* That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

* * * * *

(c) Payment or acceptance of commission, brokerage or other compensation.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or

any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

* * * * *

(f) Knowingly inducing or receiving discriminatory price.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. (Oct. 15, 1914, ch. 323, § 2, 38 Stat. 730; June 19, 1936, ch. 592, § 1, 49 Stat. 1526.)

* * * * *

§ 15. Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731.)"

STATEMENT.

Respondent deems petitioners' statement of the case wholly inadequate.

Respondent recovered a judgment n. o. v. against the petitioners in the District Court in the amount of $5,888.70, which, being trebled pursuant to statute, resulted in a judgment of $17,666.10, together with a $2,500 allowance for attorneys' fees. On appeal the Circuit Court of Ap-

peals reduced the judgment to $4,449.31 and affirmed the same in the amount of $13,347.93, together with attorneys' fees.

Respondent's suit was brought under the Anti-Trust Laws. The commodities involved were the subject of Congressional attention in the Anti-Hog-Cholera Serum Marketing Act (7 U. S. C. A. § 851). Reference to the substance of such legislation is, therefore, a necessary preliminary to further statement of the case.

The Clayton Act of 1914, which is part of the Anti-Trust Laws, prohibited threats to competition and thwarted trends toward the creation of monopolies to be effected by means of unjustifiable discriminations in price. Such price-cutting tactics had been frequently employed in selected localities by dominant manufacturers as a preliminary step in the erection of a monopoly. The Robinson-Patman Act, enacted in 1936, implemented this basic purpose of the Clayton Act. It further extended the prohibition against unjustified price discriminations and also prohibited certain specific trade practices which had grown up and which the Congress deemed pernicious. At the time of the acts complained of in this case, therefore, it was unlawful for persons engaged in commerce to discriminate in price between different purchasers of commodities of like grade and quality where the effect *may* be to lessen competition, or, to injure, destroy or prevent competition *with* any person who either grants or knowingly receives the benefit of such discrimination. It was also unlawful under the Anti-Trust Laws for one party to a bargain to pay a commission, brokerage, rebate, or any other form of compensation to an agent for the opposite party to the bargain.

Under Title 15, § 13(a), a discriminatory price having been shown by evidence, the burden of rebutting the prima facie case and justifying the discriminatory price, passes

to the person charged with the violation of the section. This is because that portion of the law which permits differentials (which make *only due allowances* for differences in cost of manufacture, sale or delivery) comes under a *proviso* and it is well settled law that he who would claim the benefit of a *proviso* in a statute (in this case the petitioners) has the burden of pleading and proving the same.

Under Title 15, § 13(c), it is declared to be unlawful for any person engaged in commerce "to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

The evidence in this case showed conclusively that the secret rebate arrangements hereinafter set forth, which were in effect between petitioners, constituted a violation of Title 15, § § 2(a), 2(c), 2(d), and 2(f), and the District Court and the Circuit Court of Appeals had no other alternative than to so hold.

Anti-hog-cholera serum, as the name implies, is a product made by processing the blood withdrawn from hogs that have successfully resisted the disease (R. 237, 238). All such serum is produced under license from the United States Department of Agriculture. The processes are carried out under Government inspection. Because the serum is produced under license and under Government inspec-

tion, the serum produced by any one manufacturer is very little different than the serum produced by another.

The Anti-Hog-Cholera Serum and Hog-Cholera Virus Act, enacted August 24, 1935, was one of a series of amendments to the Agricultural Adjustment Act of 1933. (7 U. S. C. A. §§ 851-855.) The Serum Act declared a Congressional policy of (1) assuring the maintenance of an adequate supply of anti-hog-cholera serum and virus, and (2) preventing undue and excessive fluctuations of market prices and unfair methods of competition and unfair trade practices in the marketing of such serum and virus. In order to achieve these ends the legislation contemplated, that, after due notice and hearing to interested parties, a Marketing Agreement might be entered into between the Secretary of Agriculture and the manufacturers and handlers of serum and virus. The *making* of any such Marketing Agreement was not to constitute a violation of the Anti-Trust Laws.

The legislation contemplated that any such approved Marketing Agreement should contain terms and conditions requiring each manufacturer to have available on May first of each year a supply of completed serum equal to 40% of his last year's sales; also that such Agreement should contain provisions (a) prohibiting unfair methods of competition and unfair trade practices; (b) that such serum should be sold only at prices filed and announced by such handlers; (c) that the Secretary should select an agency to administer the Secretary's Order and supervise the activities of the handlers. Whenever handlers of 75% of the interstate volume of serum and virus had signed such a Marketing Agreement the Secretary of Agriculture was empowered to issue an Order regulating such handling of serum and virus in the manner contemplated by the Marketing Agreement. Both the Marketing Agreement and

the Secretary's Order envisioned the creation of a Control Agency of twelve members to supervise the operation of the Marketing Agreement, consisting of and representing manufacturers and distributors of serum and virus. (7 U. S. C. A. §§ 853, 854, 855.)

The most crucial provision of the Marketing Agreement and the Order was a provision for the public posting or filing of prices and terms of sale for serum and virus. The Marketing Agreement provided that each serum handler was required to file with the Secretary and with the Control Agency a list of his selling prices for serum and virus prevailing in the United States, including terms of sales and discounts to each class of buyer as defined in the Marketing Agreement. A form of schedule was prescribed by the Agency to be used in filing such prices (R. 521). By this means there was provided a central agency where there would be an open and public listing of all prices by each manufacturer to each classification of buyer. No handler was to make sales of serum or virus unless he had a list of his prices on file. No handler was to make sales at any prices or terms which were different from those set forth in his posted price list. Provision was made for change in prices or for the suspension by the Secretary of any price which he deemed inequitable. Unfair methods of competition and unfair trade practices were prohibited (R. 688). The secret payment or allowances of rebates, refunds, commissions or unearned discounts, whether in the form of money or otherwise, or secretly extending special services or privileges to certain purchasers with the intent and effect of injuring a competitor, or where the effect might be to substantially lessen competition or tend to create a monopoly, was defined by the Agreement as an unfair trade practice (R. 688).

Anchor Serum Company, one of the petitioners, is a

Missouri corporation with a plant and offices located at St. Joseph, Missouri, where it is engaged in the manufacture of anti-hog-cholera serum and hog-cholera virus (R. 63, 85).

Illinois Farm Bureau Serum Association is an Illinois corporation which was organized under the Agricultural Cooperative Act of the State of Illinois (R. 723). Its corporate charter provided that its corporate purpose was to act as agent for its members, in collectively purchasing, handling, and distributing livestock and preventive disease biologics, of which anti-hog-cholera serum was one. Its membership was composed of and limited to so-called County Farm Bureaus. There were over 75,000 individual members of the County Farm Bureaus located in the State of Illinois, of whom 20,000 were serum purchasers. The serum-selling activities of the County Farm Bureau members blanketed 100 of the 102 counties in the State of Illinois (R. 1063). Petitioner maintained desk space in the offices of the Agricultural Association but it had no refrigeration or storage facilities. In actual practice the orders for serum were sent by the individual County Farm Bureaus direct to the manufacturer Anchor at St. Joseph, Missouri. Anchor filled the orders, shipped the serum direct to the individual County Farm Bureau requesting the same. Then Anchor sent the bill therefor to petitioner Illinois at its office in Chicago, who paid the same in due course, and collected from its member.

Respondent is a cooperative organization organized under the laws of the State of Iowa. Its serum manufacturing plant, principal office and place of business is located at Sioux City, Iowa (R. 229). In May 1937, it succeeded to a serum manufacturing business theretofore conducted

by the American Serum Company which was not a cooperative corporation. Respondent conducts its business in Illinois primarily through drug stores and other similar store outlets having refrigeration facilities, under a warehousing arrangement (R. 239-240). Under this arrangement the druggist or warehouseman received a shipment of serum from the plaintiff and placed it under proper refrigeration. The serum belonged to the plaintiff, and not to the warehouseman. When customers came to the warehouseman's place of business to purchase serum, the warehouseman made a record of the delivery, collected for the serum at 75¢ per 100 ccs., or 65¢ per 100 ccs., as the case might be, remitted to the plaintiff, who paid or allowed the warehouseman a handling charge, which was usually 12¢ per 100 ccs. At the time customers came to purchase plaintiff's serum they applied for membership in the plaintiff's cooperative organization and they received their share of the patronage dividend at the end of the appropriate fiscal year (R. 278-279). Most of the plaintiff's outlets were located in what was regarded as the hog-raising areas of Illinois (R. 240).

On December 7, 1936, the Marketing Agreement between the Secretary of Agriculture and the handlers of serum above referred to became effective. The first public posting of handlers' prices was to be filed with the Secretary of the Control Agency not later than December 17, 1936 (R. 686).

On December 14, 1936, petitioner, Anchor Serum Company, posted the following prices of serum with the Control Agency:

Consumers	75¢ per 100 ccs.
Dealers	63¢ per 100 ccs.
Wholesalers	51¢ per 100 ccs.
Volume Contract Purchasers	49¢ per 100 ccs.

Across the bottom of the form filed with the Secretary was typed the following legend:

> "We prepay forwarding charges. We also spend liberal allowances for advertising and sales promotion work."

On December 16, 1936, respondent filed the following serum prices with the Control Agency (R. 79):

Consumers	75¢ per 100 ccs.
Dealers	63¢ per 100 ccs.
Wholesalers	(none)
Volume Contract Purchasers.......	(none)

The evidence is *uncontroverted* that petitioner Anchor *did not* sell its serum to the Illinois County Farm Bureaus, through petitioner Illinois, in accordance with the 49¢ price which it posted for the "Volume Contract Purchaser" classification (R. 143). The evidence showed that from December 1936 until July 13, 1939, there existed between petitioner Anchor and petitioner Illinois, a secret and illegal system of rebates and allowances which were by them intended to and did reduce the *actual* price paid by Illinois for Anchor serum below the published 49¢ per 100 ccs. price which was filed with the Control Agency.

That is to say from December 14, 1936, until July 13, 1939, petitioner Anchor's posted price for serum sold to Volume Contract Purchasers was publicly announced as 49¢ per 100 ccs. The evidence showed, without dispute, that for the period from December 1936 until July 1, 1937, petitioner Illinois collected from petitioner Anchor a rebate of 4¢ per 100 ccs. below the said public price. This made the actual or private price to Illinois 45¢ per 100 ccs. instead of the 49¢ per 100 ccs. which was announced in the posted schedule.

Commencing on July 1, 1937, petitioner Anchor increased the amount of the rebate from 4¢ to 8¢ per 100 ccs. Thus

the secret sales price prevailing between Anchor and Illinois became 41¢ per 100 ccs. The publicly posted price remained at 49¢ per 100 ccs. The rebate continued at the 8¢ level throughout the remainder of 1937 and the early part of 1938.

Effective March 25, 1938, the amount of the rebate was again increased, this time from 8¢ to 13¢ per 100 ccs., thus making the secret Anchor-Illinois price for serum 36¢ per 100 ccs., while the publicly posted price still remained at 49¢ per 100 ccs. (R. 649, 652).

The earlier rebates had been handled by an oral arrangement. The 1938 rebate increase from 8¢ to 13¢ was represented by two, separate, written contracts.

That is to say, two contracts were written and signed. Both contracts were dated and executed on the same day, to-wit, March 25, 1938. One contract between Anchor and Illinois purported to fix the contract price for serum at 49¢ per 100 ccs. (which was consistent with the publicly posted price) and contemplated the delivery to County Farm Bureaus of a total quantity of 35,000,000 ccs. (R. 649). The second contract dealt *only* with and fixed the amount of an "allowance" for "educational and promotional activities" at 13¢ per 100 ccs. (R. 653). The record contains no explanation for the need for two separate contracts. Thus, if someone had asked either of the petitioners to submit the sales contract for inspection, it would show an apparent compliance with the posted price, whereas, by virtue of the second contract there was actually a secret discount of 13¢ for so-called "educational and promotional activities" which reduced the price from 49¢ to 36¢ per 100 ccs.

The 36¢ price for serum remained a secret arrangement between petitioners until July 13, 1939, when, as a conse-

quence of proceedings instituted by the Control Agency against Anchor, petitioner Anchor filed a revised schedule with the Control Agency, publicly announcing the price of 36¢ per 100 ccs. (R. 695).

During the period between December 1936 and March 25, 1938, the rebate was handled as a *deduction* from the face amount of the monthly statements sent by Anchor to Illinois. To illustrate: During the month of December, 1936, Anchor shipped to the various Illinois Farm Bureaus 1,178,830 ccs. of serum and 95,145 ccs. of virus, for which the total purchase price was $6,967.53. On the face of the invoice a deduction was allowed for "adv." at the rate of 4¢ per 100 ccs. on serum and 5¢ per 100 ccs. on virus, or a total deduction of $519.11, making the net amount of the invoice $6,448.42, for which petitioner Illinois sent petitioner Anchor its check in payment (R. 199).

Under date of March 25, 1938 (the date of the two written contracts) the system was changed (R. 203). Commencing on this date, petitioner Anchor sent petitioner Illinois monthly bills for serum which had been shipped by it to the various County Farm Bureaus. On their face, these statements or invoices were calculated at the public posted or contract price of 49¢ per 100 ccs. for serum, and Illinois remitted to Anchor accordingly. However, each month, petitioner Illinois would bill petitioner Anchor for the amount of the rebate, *i. e.*, 13¢ per 100 ccs., describing the charge in its bill as "compensation for promotional services per agreement." Anchor then sent Illinois a check for the appropriate amount (R. 711). To illustrate: On April 14, 1938, petitioner Illinois billed petitioner Anchor for the sum of $455.01, which included a rebate of 13¢ per 100 ccs. on account of serum shipped for the last six days during March. On April 15, 1938, petitioner

Anchor sent petitioner Illinois its check in payment of the Illinois statement. This method continued in force until July 13, 1939, when Anchor changed its public posted price to Volume Contract Purchasers from 49¢ per 100 ccs. to 36¢ per 100 ccs. and the private rebate system was abandoned (R. 695).

The evidence showed, without dispute, that during 1937, out of a total quantity of 29,463,925 ccs. of serum purchased that year by Illinois from all suppliers, Anchor supplied to Illinois County Farm Bureaus 15,007,925 ccs. and it allowed petitioner Illinois deductions from invoices totaling $8,666.83.

During the calendar year 1938, out of a total quantity of 35,681,600 ccs. of serum purchased by Illinois County Farm Bureaus from all suppliers, Anchor supplied 30,625,-250 ccs. and paid petitioner Illinois rebates totaling $39,044.30.

For the year 1939, out of total purchases from all suppliers of 39,354,325 ccs. of serum, Anchor supplied Illinois County Farm Bureaus with 24,716,250 ccs. of serum; and during the period from January 1, 1939 to July 13, 1939, collected in rebates from petitioner Anchor the total sum of $32,188.35 (R. 753, 1115).

In their statement of "some of the material facts of the case," petitioners have sought inferentially to justify these allowances as constituting orthodox advertising or sales promotional expenditures (Pet. pp. 5-6).

The evidence was *uncontroverted* that, according to the books of account of each of the petitioners, neither petitioner treated the amount of the rebate as constituting a real expenditure for advertising or sales promotion expense. Each treated the rebates merely as affecting or reducing the price of the serum. In the case of the Anchor

books of account, the total of the moneys which it either had credited or paid each month to petitioner Illinois, for the period 1936-1939 were credited to the regular sales account of petitioner Illinois. That is to say, Anchor did not treat the allowance as an advertising expense (R. 197). In the case of Illinois the entries on its books of account showed that it, too, considered the rebates which it received as serving to reduce the price which it paid for serum. According to a statement of the *cost* of serum taken from the books of petitioner Illinois and admitted at the trial to be true and correct, its average cost for 1936 was 37¢ per 100 ccs.; for 1937, 42¢ per 100 ccs.; for 1938, 37¢ per 100 ccs.; and for 1939, 36¢ per 100 ccs. (R. 221, 751). The books of account of petitioner Illinois showed, for example, that during 1937, although it had deducted $8,666.83 from Anchor's statements for "adv." its books showed that it only expended for advertising the sum of $648.53 (R. 749, 1115). During 1938, petitioner Illinois received $39,044.30 from petitioner Anchor for "adv." or "educational or promotional expense." However, according to its own books, it expended that year for "advertising and promotion" the sum of $611.77 (R. 749, 1115). Between the dates of January 1 and July 15, 1939, Illinois received from Anchor the sum of $32,188.35, but according to its own books the total sum expended by it during the entire year for "advertising" and "promotion" was the sum of $1,236.97 (R. 749, 1115). The motion picture, "Swine Insurance," referred to in petitioner's statement (Pet. p. 6), was produced in 1939 at a total cost, according to the books, of $2,290.27.

As a matter of fact, the *total actual operating expense* of petitioner Illinois for management, salaries, traveling, telephone, advertising, etc., during the years 1936-1940, was not more than from $4,000 to $6,000 per year (R. 749).

Having examined the figures shown by statements to have constituted Illinois' sales of serum and its advertising expense, respectively, for the years 1936-1940, an accountant witness for the respondent testified that Illinois' advertising expense for the year 1936, in terms of 100 ccs. of serum, was 2/10 of 1¢; for 1937 it was 13/100 of 1¢; for 1938 it was 17/100 of 1¢; for 1939 it was 8/10 of 1¢ (R. 299-300). The minutes of the Board of Directors of Illinois indicated that the directors regarded the rebate merely as a means or device for achieving or obtaining a *net* price (R. 759).

Another circumstance bearing on the propriety of the alleged "advertising" allowance, and likewise pointing to the extent to which Anchor went in order to preempt the serum market in Illinois, is reflected in its relationships with Fidelity Laboratories, Inc. The latter is a serum manufacturing corporation located at Chicago, Illinois. Although for the five-year period 1936-1940 (both inclusive) Anchor was the largest individual supplier of serum to petitioner Illinois, the Fidelity Laboratories had been one of four suppliers during the year 1936 (R. 753). In certain counties in Illinois serum manufactured by the Fidelity company could be delivered with a good deal more promptness than if it were to be shipped from the Anchor plants at St. Joseph, Missouri (R. 163). Fidelity serum had come to be favorably regarded by some of the County Farm Bureaus. In any event, in the written contract of March 25, 1938, Anchor agreed with Illinois that for such County Farm Bureaus as wanted Fidelity serum Anchor would purchase such serum from Fidelity and deliver it *at the same price* as that charged Illinois for the Anchor serum (R. 766). The evidence showed that during the year 1938, Fidelity Laboratories delivered 2,529,000 ccs. of serum to various County Farm Bureaus in Illinois (R.

144). ***Anchor paid Fidelity 40¢ per 100 ccs. for such serum (R. 145).*** Anchor also allowed Illinois the so-called "advertising" rebate on such serum. Thus it sold such serum to Illinois at the net price of 36¢ per 100 ccs., which was 4¢ less than the price Anchor had paid to Fidelity for such serum (R. 145).

The evidence showed that the system of illegal rebates, discounts, and the discriminatory and unlawful prices which resulted therefrom, were successful in ousting all the suppliers of serum from dealings with the County Farm Bureaus in Illinois and resulted in making Anchor serum virtually the only product sold by County Farm Bureaus in this State. Exhibits in evidence show: that in the years 1936 and 1937, Anchor supplied over 50 per cent of the serum purchased by Illinois County Farm Bureaus through petitioner Illinois and was one of four manufacturers supplying such serum. In 1938, Anchor supplied over 85 per cent and was one of three manufacturers. In the years 1939 and 1940 petitioner Anchor became the *only* serum manufacturer supplying serum to the Illinois County Farm Bureaus and it purchased serum from Fidelity Laboratories at a loss in order to be in a position so to do (R. 753).

When petitioner Anchor posted its list of prices with the Control Agency this constituted a public certification of its prices prevailing to those classifications listed (R. 693). In such posting, over the signature of W. J. Kennedy, its vice president and sales manager, *said defendant publicly announced, and therefore for the purposes of this litigation it is estopped to deny,* that its price to *all* so-called Volume Contract Purchasers was 49¢ per 100 ccs. The *uncontradicted* evidence in this case is, that, instead of selling to defendant Illinois at its publicly posted price of 49¢, it sold serum to Illinois at a price of 45¢ from December 1936 until July 1937, at a price of 41¢ from

July 1937 to March 1938, and at 36¢ from March 1938 until July 1939. Such prices were inconsistent with the price announced as offered *all other* Volume Contract Purchasers and therefore became discriminatory. Under the provisions of Title 15, § 13(b), a lack of uniformity in Anchor's prices to purchasers answering the volume contract purchaser qualification having been shown in the plaintiff's case, the burden of proof then shifted to petitioner Anchor to justify or explain its price to Illinois. *No such burden was either attempted or discharged. No explanation was furnished.* The defense consisted entirely in an attack on the respondent and its motives in instituting the litigation.

Plaintiff's posted price to its consumers of 75¢ per 100 ccs. was the generally prevailing price charged by all serum manufacturers to consumers.

During January 1937, following the posting of its consumer price, plaintiff received complaints from its Illinois warehousemen to the effect that they were not able to sell plaintiffs serum at 75¢ because the County Farm Bureaus were selling Anchor Serum (purchased under the illicit arrangement above described) at 65¢ (R. 285, 289, 313, 315, 293, 294). In order to meet the competition from County Farm Bureau units and hold its own customers and protect its market, plaintiff therefore instructed its warehousemen to reduce its consumer price in those areas where it was necessary to meet the Farm Bureau competition and to prevent a destruction of the respondent's business in Illinois by the transfer of the allegiance of its members to the Anchor product (R. 279, 280).

Respondent produced, identified and offered in evidence its original ledger sheets showing the accounts of 36 of its warehousemen wherein it had received 10¢ per 100 ccs. less for its serum, in order to meet the kind of competition

fostered by the illicit arrangements referred to above (R. 787, 974). An accountant summarized all of the entries on such sheets, where such allowances had been made. For the period from January 1, 1937 to July 13, 1939, this amounted to the sum of $4,449.31, and this amount, being trebled, constitutes the basis for the judgment affirmed by the Circuit Court of Appeals (R. 1165, 1267).

The evidence in this case is *uncontradicted.* The defenses asserted by the petitioners related to various propositions of law, and may be summarized as follows: (1) that they are exempt from the Anti-Trust Laws and under the Serum Marketing Act they could do "with immunity what the Anti-Trust Laws forbade" (Pet. p. 18, 20); (2) that certain of the evidence offered by respondent relating to damages was hearsay and therefore incompetent (Pet. p. 26); (3) that the entry of judgment n.o.v. was a denial of jury trial (Pet. p. 32); (4) that it was error to hold that petitioners had the burden of proof of justifying the discriminatory price (Pet. p. 34); (5) that respondent was guilty of "unclean hands" (Pet. p. 37); (6) that respondent had no right to sue as a corporate entity (Pet. p. 40).

ARGUMENT.

Petitioners were not exempt from the Anti-Trust Laws and could not do "with immunity what the Anti-Trust Laws forbade." Simply stated, petitioners contend that they were exempt from actions which might be brought against them under the Anti-Trust Laws because the petitioner Anchor was a party to the Marketing Agreement between the Secretary of Agriculture and the handlers of serum (Pet. p. 18). As a subsidiary argument, petitioner Anchor

contends that even if it sold serum at a price which was discriminatory and contrary to its published price, the *only* proceedings which might be taken against it were under the Marketing Agreement (Pet. p. 39). These contentions are based entirely on the ground that the Anti-Hog-Cholera Serum and Hog-Cholera Virus Act, after first granting the power to the Secretary of Agriculture to enter into a marketing agreement with handlers of serum, goes on to provide: "* * * the making of any such agreement shall not be held to be in violation of any of the Anti-Trust laws of the United States and any such agreement shall be deemed to be lawful."

The answer to petitioners' contention is that the *only* exemption granted by the statute is in respect to the act of the *making* of the Marketing Agreement between the Secretary of Agriculture and the handlers or manufacturers of serum. This point has already been decided against petitioners in the case of *United States* v. *Borden*, 308 U. S. 188, 198, where the exact language here involved was interpreted by this Court contrary to petitioners' views. In the *Borden* case, an indictment against (1) a number of milk distributing corporations, their trade association, and bottle exchange, (2) a cooperative association of milk producers, (3) a drivers' union, (4) municipal officials, and (5) arbitrators of disputes charged violations of the Anti-Trust Laws. On demurrer it was contended that the effect of language (identical with that here involved) in the Marketing Agreement Act of 1937 (legislative successor to the A. A. A.) was to remove the production and marketing of milk from the purview of the Anti-Trust Laws. The District Court had held that the mere adoption by the Congress, of the Marketing Agreement Act, operated to remove any such agricultural products from the Anti-Trust Laws, and to vest complete authority in the Secretary of Agriculture. This Court re-

jected the contention and reversed the District Court. It said, *United States* v. *Borden,* 308 U. S. 188, at page 198:

> "We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create 'so great a breach in historic remedies and sanctions.' ".

The Serum Marketing Agreement *did not* give permission to handlers to grant rebates, create discriminatory prices, or engage in unfair trade practices. The petitioners therefore not only violated the Anti-Trust Laws, they violated the Marketing Agreement as well. Their contention is, that the statute exempted them from the actions under the Anti-Trust Laws, but, as this Court has already decided, Congress did not intend to create "so great a breach in historic remedies and sanctions." The *only* exemption granted by the Congress was in respect of the act of *entering into the Agreement with the Secretary.* Examination of the legislative history makes this quite clear.*

Petitioner Anchor asserted in its pleadings prior to trial, and at the trial made an offer of proof which was

* See remarks of Senator Norris in connection with the enactment of the A.A.A., Cong. Rec. Vol. 77, Part 2, pp. 1159-2300, 73rd Congress, 1st Session, with particular reference to remarks at page 1970.

rejected, to the effect that after it had filed a corrected price list on July 13, 1939, the Secretary of Agriculture on September 12, 1939, dismissed a complaint against Anchor that had been filed with him by the Control Agency. The argument is advanced that the Secretary's administrative action was in effect a species of *res adjudicata*, "should be conclusive on all parties" (Pet. p. 39) and operates to prevent the plaintiff from initiating civil remedies afforded by the Anti-Trust Laws. The argument is a corollary to the argument that petitioners were exempt. What has been said above is applicable alike to this argument. The exemption granted was very limited and very narrow and extended only to the *making* of the Marketing Agreement. Remedies afforded were therefore supplementary to each other. The cases of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49-52, and *Macauley et al.* v. *Waterman Steamship Corp.*, 90 L. Ed. Advance Sheet 11, at page 676, cited by the petitioners, are not in point. These are cases where the basic legislation specifically granted *exclusive* jurisdiction to an administrative agency; in the one case the N.L.R.B., and in the other, a Maritime Renegotiation Commission. That is not the case here.

The illicit rebate arrangements between Anchor and Illinois also constituted a clear-cut violation of Title 15, § 13(c). This section of the Anti-Trust Laws provides that it shall be unlawful for any person engaged in commerce, "to pay or grant, or to receive or accept, anything of value as a commission, broker's or other compensation, *or any allowance or discount in lieu thereof*, except for services rendered in connection with the purchase of goods, wares, or merchandise, either to the other party to such transaction *or to an agent, representative or other intermediary therein*, where such intermediary is acting in fact for or in behalf, or is subject to, the direct or indirect control of any party

to such transaction, other than the person by whom such compensation is paid or granted." (Italics ours.) This particular section, which was added by the Robinson-Patman Act in 1936, does *not* require any proof that the practice followed had any effect on competition. It was intended by the Congress to strike at the practice of those who controlled tremendous buying power, demanding that substantial "discounts" or "allowances" be paid either direct to themselves, or to some employee, or agent controlled by the buyer, but purporting to act as a sort of middleman in the transaction.

In this case, petitioner Illinois was really nothing more than a corporate "purchasing agent" for the approximately 100 County Farm Bureaus scattered throughout the State of Illinois. Its articles of incorporation provided that its object was "to act as agent for its members in collectively purchasing, handling and distributing" serum and virus (R. 723). Its by-laws so provided (R. 727). A contract between Illinois and its members recited that it was formed to provide a "central purchasing service". Under this agreement the member County Farm Bureau appointed and constituted Illinois "its sole and exclusive agent" to bargain for and purchase said serum and the member agreed *not* to buy its serum from any other source (R. 744). Furthermore, each member agreed to maintain a uniform retail sales price, determined, *not* by the member, but by the petitioner Illinois (R. 745). As such "agent", under the provisions of Title 15, § 13(c), petitioner Illinois was clearly ineligible to receive from the petitioner Anchor any "discount" or "allowance" or "commission" however it was disguised or by whatever name called. Application of this section of the Anti-Trust Laws does not even depend on proof that the practice complained of had any tendency to lessen competition or cre-

ate monopoly. This section has been upheld and applied uniformly by all Circuits in the cases of *Biddle Purchasing Co.* v. *Federal Trade Commission*, 96 F. (2d) 687, *cert. denied* 305 U. S. 634; *Oliver Bros.* v. *Federal Trade Commission*, 102 F. (2d) 763; *A. & P. Tea Co.* v. *Federal Trade Commission*, 106 F. (2d) 667, *cert. denied* 308 U. S. 625, and *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. (2d) 393.

Petitioners' contention that certain evidence was incompetent fails to recognize a settled exception to the hearsay rule. At the trial petitioners argued that the testimony of Messrs. Huff and Davis, officials of the respondent, as to the reasons assigned to respondent by their various druggists why the latter could not sell respondent's serum at 75¢, and which resulted in respondent's reduction in price, was hearsay and incompetent. Such testimony constitutes an exception to the hearsay rule and its admissibility has been sustained in both civil and criminal cases arising under the Anti-Trust laws. (Wigmore, 3d Ed., Vol. 6, § 1729, p. 91.) It was admissible to show the *reason* assigned and given to the respondent by its warehousemen-druggists when requesting a reduction in price from respondent. Cases of this type are analogous to "loss of custom" cases and it was clearly competent for officials of the plaintiff to testify that they received such complaints, what they consisted of, and what the respondent did in reliance thereupon. In the case of *Lawlor* v. *Lowe*, 235 U. S. 522 (the so-called "Danbury Hatters" case) certain non-union employers brought an action under the Sherman Act against certain unions, and after extended litigation, recovered a verdict in damages. In that case, *salesmen for the plaintiff* had testified at the trial *as to the reasons given to them* by customers on whom they called, for refusing to purchase hats made by plaintiff. (See 235 U. S., at page 532.)

The admission of such testimony was assigned as error on the same grounds urged here. (See 235 U. S., at page 527.) Mr. Justice Holmes made short work of the contention. He said (235 U. S., at p. 536):

> "The reason given by the customers for ceasing to deal with sellers of the Lowe hats, including letters from dealers to Lowe & Co., were admissible. 3 Wigmore, Evidence, § 1729 (2)."

Similar decisions supporting the rule are the cases of *Kimm* v. *Steketee*, 48 Mich. 322, 12 N. W. 177; *Weston* v. *Barnicoat*, 175 Mass. 454, 56 N. E. 619; *Brannen* v. *Bouley*, 272 Mass. 67, 172 N. E. 104; *Hubbard* v. *Allyn*, 200 Mass. 166, 86 N. E. 356; *Greater New York Live Poultry C. of C.* v. *United States* (C. C. A. 2), 47 F. (2d) 156, 159. The state of mind of the dealers in respondent's products was proved by such declarations, and for such purpose the testimony was clearly admissible.

The entry of judgment n.o.v. did not deny petitioners trial by jury. Under Rule 50 of the Federal Rules of Civil Procedure, district courts, where the state of the evidence warrants, have the right to either direct verdicts or set aside jury verdicts for either plaintiff or defendant and enter judgment accordingly. As early as the decision in the case of *Delaware L. & W. R. R.* v. *Converse*, 139 U. S. 469, 472, this Court said: "* * * it is well settled that the court may withdraw a case from them (jury) altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." The decisions in the cases of *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, and *Galloway* v. *United States*, 319 U. S. 372, 389, hold that the exercise of

such power by a district court does not constitute an invasion of the right of jury trial, since trials at the common law contemplated the exercise of that right by the judge. Where, as here, the evidence is such that there can be but one reasonable conclusion as to the proper verdict the Court must determine the issues accordingly. In this case, reasonable minds could not differ as to the result to be reached—unless evidence is completely ignored. *All of the respondent's evidence was undisputed.* There was no controversy in the evidence with respect to the relationships prevailing between the petitioners from December 1936 until July 1939. There was no dispute as to how the net price Illinois paid for its serum was arrived at. Neither of the petitioners offered any evidence to justify the discriminatory and favorable price granted to Illinois. Nor was there any controversy in the evidence as to the steps which were taken by the respondent in order to protect itself. Petitioners claim that such steps were unnecessary, but there is no testimony which contradicts the fact that such steps were taken by the respondent. The matter of the amount of damage was a mere matter of computation. To prove the amount it had been damaged respondent produced in court its original books and records, consisting of (a) four volumes of original orders, (b) a bound book of credit memos, and (c) its original ledger sheets pertaining to each of the particular druggists involved. These were properly identified and offered in evidence in accordance with Federal Statutes (28 U. S. C. A. 675). Furthermore, prior to the trial of the cause, under a stipulation of the parties, accountants for the petitioners had been given access to all of the respondent's financial books and records for the period from January 1930 to March 1942 (R. 121). Such accountants for the petitioners made an examination of the respondent's books and records, including those produced at the trial (R. 121, 359). As a result of such

examination, complaint was made at the trial of bookkeeping errors amounting to a total of $129.13 (R. 328). This amount was conceded by the respondent, and respondent's claim was reduced by that amount, and the *amount* of damages removed from the field of controversy. The courts have consistently entered verdicts for specified amounts when there has been no real issue in respect thereto, or where, as here, the amount is merely a matter of computation, or there is no evidence or defense raising a contest as to the amount claimed, or the defense thereto has failed. 105 A. L. R. 1076; *Jacobi Hardware Co.* v. *Vietor, et al.*, 11 F. (2d) 30, 33; *Selden* v. *Lee* (App., D. C.), 3 F. (2d) 335, 336; *Globe & Rutgers Ins. Co.* v. *Prairie Oil & Gas Co.*, 248 Fed. 452, 458.

The burden of proof was on petitioners to justify the discriminatory price granted to Illinois. Petitioners claim that the Circuit Court has changed the rules of the common law with respect to the burden of proof and has thus departed from the usual course of judicial proceedings. This argument follows from the failure of the petitioners to appreciate, that, under the provisions of the Anti-Trust Laws, he who grants or maintains a discriminatory price must be prepared to justify such price (or practice leading thereto) when and if challenged. Thus, under § 13(a) it is declared to be unlawful for any person to create price discriminations, *provided,* that nothing contained in such section prevents differentials which make *only* due allowance for "differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." It is well settled law that he who would claim the benefit of a *proviso* in a statute undertakes the burden of bringing himself within the same. That is ancient law. It was applied in a virtually identical situa-

tion in the case of *Ladoga Canning Co.* v. *American Can Co.*, 44 F. (2d) 763, cert. den. 282 U. S. 899. Neither of the petitioners undertook any such burden in this case. Furthermore, as the Circuit Court pointed out, the intention of the Congress to fasten the burden of proof on he who is charged with granting a discriminatory price, is made perfectly clear in § 13(b), where, dealing with proceedings before the Federal Trade Commission, the statute provides *specifically* that the burden of proof shall be that of the erring seller. The Circuit Court made no change in well settled rules of the common law.

Respondent was not guilty of unclean hands. There is no important question of Federal law to be decided. Another defense pleaded in the answers of both petitioners, overruled by the District Court for insufficiency as a matter of law, and argued by the petitioners (Pet. p. 37) asserts the application of the "clean hands" doctrine. It is said that because respondent, in defense of its Illinois market, met the petitioners' kind of competition by instructing its Illinois outlets to sell serum at 65¢ wherever necessary to meet that competition, it violated its own posted price of 75¢ posted with the Control Agency. The so-called "clean hands" doctrine has certain limitations. "The rule that a complainant must come into equity with clean hands means that he must do equity as respects the defendants' rights in the particular matter of the suit. . . . If he is not guilty of inequitable conduct *toward the defendant* in that transaction his hands are as clean as the court can require." *Carpenters' Union* v. *Citizens Committee*, 333 Ill. 225, 250. *Nothing that this respondent did or said was responsible for the illegal arrangement that existed between the two petitioners.* Respondent was the victim and not the perpetrator of the illegal arrangement. The defense of "unclean hands" is not available

to those whose conduct invited the act or acts alleged to constitute the "unclean hands." So here, respondent's reduction in price in Illinois, even if not in accordance with its posted prices, made to protect its own Illinois market and having been the consequence of the illicit system which prevailed between the petitioners, they are estopped to assert the maxim. *Van Antwerp* v. *Van Antwerp,* 242 Ala. 92, 99; *Langley* v. *Devlin,* 95 Wash. 171, 186. Finally, the Congress recognized this principle, by providing in the Robinson-Patman Act, under which this suit is brought, that a seller may rebut a charge of price discrimination by showing that it was the result, in a particular case, of seeking to meet an equally low price of a competitor (§ 13(b)). So far as the respondent was concerned, such was the case here.

Respondent had the right to maintain this action. Another defense pleaded in the amended answers of both petitioners, overruled by the District and Circuit Courts, asserts that the respondent, as such, cannot maintain the action because, in the view of the petitioners, the cause of action for damages under the Anti-Trust Laws is one to be asserted by the individual members of the respondent, and not by the respondent as a corporate entity. It is claimed that the decision here is in conflict with the decision in the case of *Farmers Cooperative Oil Company* v. *Socony Vacuum Oil Co.,* 133 F. (2d) 101. Petitioners base their argument on the philosophy that if the respondent was required to reduce its consumer price in Illinois, in order to protect its market in this State, the loss was suffered by its members. The error in this reasoning is that it hurdles the fact that the respondent, as the corporate entity, would, as in the case of all normal sales, have been first entitled to collect in all monies due on the sales of its product. The individual members of the

respondent would acquire no right in proceeds of sales until, in due course, *after* payment of corporate charges and expenses, the action of the respondent's board of directors had fixed the amount of the patronage dividend. Until and unless a cause of action has been "passed on" by the cooperative entity to its individual member, the cooperative corporate entity has just as much right to seek to enforce and collect the proceeds of a cause of action for damages against a tort feasor, as it would to seek to collect the amount of a sale on credit, or for any other property damage. It has been held in several states, which make provision in their respective statutes for the creation of cooperative corporations, that: "The association has indeed a legal entity of its own; it is a corporation but not a corporation for gain; it may make and enforce contracts with its own members and with others; it may buy and sell; sue and be sued." *Kansas Wheat Growers Assn.* v. *Sedgwick County,* 119 Kan. 877, 244 Pac. 466; *California Canning Peach Growers* v. *Downey,* 76 Calif. App. 1, 243 Pac. 679.

The *Farmers* case cited by petitioners, presented an entirely different situation. There the cooperative was a "buying" cooperative. There the cause of action had been "passed on" with the product to each of the members of the cooperative. In the *Farmers* case, both the plaintiff cooperative entity, *and* its individual members had been compelled to pay an extra 2¼¢ per gallon for gasoline purchased from the defendant. In the *Farmers* case, since the plaintiff entity, through the sale of the gasoline, had "passed on" the increased price to its members, the court held that the cause of action to recover such illegal increase had also been "passed on" to the individual members. Here, no part of the claim against the petitioners has yet been "passed on" to the individual mem-

bers, and therefore the two cases are not at all alike on their respective facts.

Conclusion.

The evidence in this case clearly and unequivocally established that a manufacturer of serum and a vendor of such serum confederated to frustrate both the Anti-Trust Laws and the Control Agency set up under the Marketing Agreement, by making secret and illegal rebates, producing a discriminatory price in favor of the vendor. The practices proved tended with certainty to lessen competition, drive all others from the market, and tended toward the creation of monopolies for each—the one to vend in, and the other to supply the serum for, a market to be controlled by both. Respondent was compelled to reduce its consumer price in order to protect itself and its Illinois market against the consequences of the illegal arrangement between petitioners. The evidence being undisputed, it is respectfully submitted that any other result than a judgment for the respondent would have been a denial of justice.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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